

UNITED STATES BANKRUPTCY COURT  
Northern District of California  
I certify that this is a true, correct and full copy  
of the original document on file in my custody  
Dated 9/28/11  
by Ann Clowery  
Deputy Clerk

Signed and Filed: September 28, 2011



E-filing

*Dennis Montali*

DENNIS MONTALI  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re: ) Bankruptcy Case  
HELLER EHRMAN LLP, ) No. 08-32514DM  
Liquidating Debtor, ) Chapter 11 **4848**  
HELLER EHRMAN LLP, Liquidating ) Adversary Proceeding  
Debtor, ) No. 10-3203DM  
Plaintiff, ) (Consolidated with  
v. ) Nos. 10-3210; 10-3213;  
ARNOLD & PORTER, LLP, ) 10-3216; 10-3219; 10-3221;  
Defendant. ) 10-3234; 10-3235; 10-3238;  
 ) 10-3239; 10-3243; 10-3248;  
 ) 10-3251; 10-3253; 10-3254;  
 ) and 10-3263)<sup>1</sup>

**CRB**

**RECOMMENDATION OF BANKRUPTCY JUDGE  
REGARDING MOTIONS TO WITHDRAW THE REFERENCE**

TO: THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA

**I. INTRODUCTION**

Sixteen law firm defendants have asked the district court

<sup>1</sup>Defendants in these adversary proceedings are, respectively, Arnold & Porter, LLP; Davis Wright Tremaine LLP; Foley & Lardner LLP; Goodwin Procter, LLP; Hogan Lovells; Jones Day; Orrick, Herrington & Sutcliffe LLP; Patton Boggs LLP; Pillsbury Winthrop Shaw Pittman LLP; Proskauer Rose, LLP; Sheppard Mullin Richter & Hampton LLP; Summit Law Group PLLC; Wilmer Cutler Pickering Hale and Dorr LLP; Winston & Strawn LLP; Cooley Godward LLP; and Hafetz Necheles & Rocco.

1 withdraw from me the cases pending against them. I recommend that  
2 their requests be rejected and the matters left with me.<sup>2</sup> If  
3 defendants have a right to a jury in the district court, the  
4 Bankruptcy Local Rules have a simple procedure in place that is  
5 entirely consistent with controlling Ninth Circuit authority. If  
6 the cases ultimately are to be tried to the court, the Supreme  
7 Court's recent decision that has sparked this flurry of activity  
8 here and throughout the country has implicitly approved procedures  
9 that may be followed here.

10 If the matters are core and do not present a constitutional  
11 challenge to my authority, normal appellate rules work fine. If  
12 the core matters are constitutionally suspect - a question  
13 certainly not resolved by the Supreme Court - the handling of them  
14 as non-core has been endorsed by the Supreme Court, and is easily  
15 dealt with under established rules.

16 I have the background and experience in the newly developing  
17 area of substantive law involved and significant familiarity with  
18 the debtor law firm and similar actions involving this plaintiff  
19 and the trustee of another law firm. I should keep the cases  
20 through pretrial and dispositive motions, and try those where no  
21 jury right is invoked. Withdrawal of the reference at this time  
22 would amount to an unnecessary extension of the narrow holding in  
23 Stern, would be an inefficient use of judicial resources by  
24

---

25 <sup>2</sup>"A Bankruptcy Judge may, on the Judge's own motion, upon the  
26 filing of a motion [to withdraw the reference] under subparagraph  
27 (a) of this rule, recommend to the District Court whether the case  
28 or proceeding should be withdrawn under 28 U.S.C. § 157(d). Such  
a recommendation shall be served on the parties to the case or  
proceeding and forwarded to the Clerk of the District Court."  
B.L.R. 5011-2(b).

1 overburdening the district court and foregoing the services of a  
2 bankruptcy court ready, willing and able to do its job and would  
3 distort the traditional way to challenge and decide the  
4 constitutionality of a federal statute.

5 II. PROCEDURAL BACKGROUND

6 Plaintiff Heller Ehrman LLP ("Heller") sued several  
7 defendants in separate but similar adversary proceedings to  
8 recover fraudulent transfers<sup>3</sup>. Defendants here have filed motions  
9 to withdraw the reference of these proceedings from the bankruptcy  
10 court to the district court (the "Motions").<sup>4</sup> Defendants contend  
11 that under Stern v. Marshall, 131 S.Ct. 2594 (2011), bankruptcy  
12 judges do not have the authority to hear and determine fraudulent  
13 transfer actions that are specifically authorized by the  
14 Bankruptcy Code.

15 I held a status conference on September 12, 2011, that was  
16 attended by counsel for all defendants (twelve of whom had filed  
17 their Motions and three of whom did so later that week) except  
18 Summit Law Group, PLLC. Summit filed its Motion on September 19,  
19 2011. I suggested, and counsel at the status conference agreed,  
20 that the Motions be consolidated for administration so that they

---

21  
22 <sup>3</sup>The terms "fraudulent transfers" and "fraudulent  
23 conveyances" as quoted in the statute below are used  
interchangeably.

24 <sup>4</sup>The district court may withdraw the reference "for cause  
25 shown" and must withdraw if resolution of the proceeding "requires  
26 consideration of both title 11 and other laws of the United States  
27 regulating organizations or activities affecting interstate  
commerce." 28 U.S.C. § 157(d). If cause other than Stern has  
28 been alleged, or interstate commerce has been implicated (both  
unlikely), I make no recommendation.

1 could be presented to one district judge in one proceeding.  
2 Accordingly, by separate order issued concurrently with this  
3 Recommendation, all sixteen Motions are being consolidated, with  
4 this adversary proceeding designated as the lead case.<sup>5</sup> If Summit  
5 Law Group objects to this procedure it should do so promptly, in  
6 which case the court will amend the consolidation order and  
7 transmit Summit's motion separately.

8 When counsel for Heller stated that he would oppose the  
9 Motions, I informed all counsel that I would, sua sponte, make my  
10 recommendation that the Motions be denied as permitted by our  
11 local rules. Counsel for Heller has the task of advocating for  
12 his client and no doubt will do so when he opposes the Motions  
13 when it is time.<sup>6</sup> That is not my role. Rather, I make this  
14 recommendation to give the assigned district judge my best  
15 judgment about what I think Stern requires and does not require  
16 and why the adversary proceedings should stay with me for now.

17  
18  
19 <sup>5</sup>On September 21, 2011, while I was preparing this  
20 Recommendation, counsel for plaintiff advised my staff that  
21 preliminary settlements had been reached with five defendants, and  
22 there was a possibility that two more defendants will settle.  
23 Those defendants were not identified. Even when those settlements  
24 are effective, several Motions will remain.

25 <sup>6</sup>B.L.R. 5011-2(d) provides:

26 **(d) Scheduling and Briefing.**

27 Unless the assigned District Judge orders otherwise: within 14  
28 days after receiving notice of the assignment to a District Judge  
under subsection (c) of this rule, any party objecting to  
withdrawal of the reference shall file in the District Court its  
opposition brief of not more than ten pages; 14 days thereafter,  
any party supporting withdrawal of the reference may file a reply  
brief of not more than ten pages; no hearing will be held unless  
the assigned District Judge orders otherwise.

1 III. DISCUSSION

2 *A. Summary of Underlying Actions*

3 Heller, the Reorganized Debtor under a confirmed chapter 11  
4 plan, is seeking to recover from the defendant law firms the value  
5 of profits received by them with respect to unfinished business  
6 that was being handled by Heller at the time of its dissolution  
7 and taken to those firms by former Heller partners.

8 As part of its dissolution process, Heller agreed to waive  
9 its rights under Jewel v. Boxer, 156 Cal. App. 3d 171 (1984), to  
10 recover fees associated with such unfinished business and  
11 generated by its attorneys after their departure. Heller now  
12 seeks to avoid what is generally known as the Jewel Waiver as  
13 constituting actual or constructive fraudulent transfers pursuant  
14 to 11 U.S.C. §§ 548 and 550, as well as under California Civil  
15 Code §§ 3439.04, 3439.05, 3439.07 via 11 U.S.C. § 544.

16 Similar adversary proceedings have been filed in the Heller  
17 case and the Brobeck bankruptcy and resolved by settlement. None  
18 has gone to trial.<sup>7</sup>

19 *B. Law Governing My Authority to Enter Final Judgments*

20 The district courts have original and exclusive jurisdiction  
21 over all bankruptcy cases. 28 U.S.C. § 1334(a). The district  
22 courts also have original but not exclusive jurisdiction over all  
23 proceedings arising under title 11, or arising in or related to

---

24  
25 <sup>7</sup>For a more thorough description of the underlying facts,  
26 theories of recovery and examination of the fraudulent transfer  
27 law in this context, see my prior decisions in Heller Ehrman LLP  
28 v. Arnold & Porter LLP (In re Heller Ehrman LLP), 2011 WL 1539796  
(Bankr. N.D. Cal. April 22, 2011) (denying the defendants' motions  
to dismiss) and Greenspan v. Orrick, Harrington & Sutcliffe (In re  
Brobeck Phleger & Harrison LLP), 408 B.R. 318 (Bankr. N.D. Cal.  
2009).

1 cases under title 11. 28 U.S.C. § 1334(b).

2 After the Supreme Court held in Northern Pipeline Constr. Co.  
 3 v. Marathon Pipe Line Co., 458 U.S. 50 (1982), that bankruptcy  
 4 courts could not hear and decide a state law breach of contract  
 5 claim, Congress enacted procedures for determining when and to  
 6 what extent a bankruptcy court can resolve matters described in 28  
 7 U.S.C. § 1334 (a) and (b). See 28 U.S.C. § 157 ("Section 157").  
 8 A district court may refer such matters to the bankruptcy court.  
 9 28 U.S.C. § 157(a). Our district court has done so in B.L.R.  
 10 5011-1.<sup>9</sup>

11 Section 157(b)(1) of title 28 permits a bankruptcy court to  
 12 "hear and determine" all cases and all "core proceedings arising  
 13 under title 11, or arising in a case under title 11." A  
 14 bankruptcy court can enter orders and judgments in such matters,  
 15 subject to appellate review under 28 U.S.C. § 158. Subsection  
 16 (b)(2) lists examples of "core proceedings," including  
 17 "proceedings to determine, avoid, or recover fraudulent  
 18 conveyances" such as in these adversary proceedings before me. 28  
 19 U.S.C. § 157(b)(2)(H). "A determination that a proceeding is not  
 20

---

21 <sup>8</sup>Section 157 is not a jurisdictional provision. Rather, it  
 22 provides a mechanism for ascertaining whether a bankruptcy court  
 23 can enter final orders and judgments. Stern, 131 S.Ct. at 2607  
 24 ("Section 157 allocates the authority to enter final judgment  
 25 between the bankruptcy court and the district court. [ ] That  
 allocation does not implicate questions of subject matter  
 jurisdiction.") See also Heller v. Gregory Canyon, Ltd., 2011 WL  
 3878347 at \*3 n.4 (Bankr. N.D. Cal. Aug. 30, 2011).

26 <sup>9</sup>"Pursuant to 28 U.S.C. § 157(a), all cases under Title 11  
 27 and all civil proceedings arising under Title 11 or arising in or  
 28 related to a case under Title 11 are referred to the Bankruptcy  
 Judges of this District, except as provided in B.L.R. 5011-1(b)  
 [regarding actions that were pending in district court on the date  
 of the filing of the bankruptcy petition]." B.L.R. 5011-1(a).



1 a core proceeding shall not be made solely on the basis that its  
2 resolution may be affected by State law." 28 U.S.C. § 157(b)(3).

3 Section 157(b)(3) imposes on me the obligation to determine  
4 whether a matter is core or not.<sup>10</sup> For the most part the moving  
5 defendants have conceded that the actions against them are core  
6 proceedings, but I have not made a final determination. They no  
7 doubt will argue, as was done in Stern, that even though  
8 fraudulent transfer actions are core under the statute, bankruptcy  
9 judges cannot enter final judgments. Stated otherwise, they might  
10 denominate these proceedings as "unconstitutional core"  
11 proceedings because of the delegation of authority to bankruptcy  
12 judges. If I determine that these are core proceedings, I can  
13 issue a final judgment. The statute says so and Stern does not  
14 hold to the contrary. If timely objections to my doing so are  
15 raised before me and preserved on appeal, the district court can  
16 decide the issue on appeal.

17 Section 157(c)(1) permits a bankruptcy judge to hear non-core  
18 proceedings that are otherwise related to the bankruptcy case. 28  
19 U.S.C. § 157(c)(1). In such non-core, related-to proceedings, a  
20 bankruptcy court "shall submit proposed findings of fact and  
21 conclusions of law to the district court, and any final order or  
22 judgment shall be entered by the district judge after considering  
23 the bankruptcy court's proposed findings and conclusions and after  
24 reviewing de novo those matters to which any party has timely and  
25

---

26 <sup>10</sup>Section 157(b)(3) of Title 28 states that "the bankruptcy  
27 judge shall determine, on the judge's own motion or on timely  
28 motion of a party," whether a proceeding is a "core" one in which  
it can enter final judgments. 28 U.S.C. § 157(b)(3) (emphasis  
added).

1 specifically objected.”<sup>11</sup> Id. That is exactly what the bankruptcy  
2 court did not do in Stern (discussed below), and exactly why the  
3 judgment it entered was not final. It is clear from Stern,  
4 however, that the bankruptcy court there should have treated the  
5 matter before it as non-core and adhered to the proposed findings  
6 procedure in Section 157(c)(1) and Fed. R. Bankr. P. 9033. In  
7 fact, the district court in Stern treated the bankruptcy judge’s  
8 findings as proposed and modified them. The Supreme Court found  
9 no fault with that procedure but simply ruled that the district  
10 court judgment was too late: a Texas probate judgment was entered  
11 between the time of the bankruptcy court’s ruling and the district  
12 court’s judgment and was thus entitled to preclusive effect.

13 If I keep these matters and the district court on appeal  
14

---

15 <sup>11</sup>Federal Rule of Bankruptcy Procedure 9033 governs the  
16 procedures for a district court’s de novo review of the proposed  
17 findings of fact and conclusions of law of a bankruptcy court in a  
18 non-core proceeding. A party must file and serve written  
19 objections within 14 days of service of the findings and must  
20 identify the specific finding or conclusions to which they object  
21 as well as the grounds for such objection. The objecting party  
22 must arrange for a prompt transcription of the record for the  
23 review. Fed. R. Bankr. P. 9033(a).

24 “The district court shall make a de novo review upon the  
25 record or, after additional evidence, of any portion of the  
26 bankruptcy judge’s findings of fact or conclusions of law to which  
27 specific written objection has been made in accordance with this  
28 rule. The district judge may accept, reject, or modify the  
proposed findings of fact or conclusions of law, receive further  
evidence, or recommit the matter to the bankruptcy judge with  
instructions.” Fed. R. Bankr. P. 9033(d).

De novo review therefore does not necessarily require a new  
trial; rather, the district court has broad discretion in the  
manner in which it conducts its de novo review. The notion that  
the district judge will have to reinvent the wheel and start all  
over is simply not so. De novo review might be nothing more than  
reviewing the findings and agreeing with them. And review of  
conclusions of law de novo is exactly the same as the rule of  
appellate practice.



1 disagrees with my determination that a matter is core, or perhaps  
2 is "unconstitutionally core," it can simply treat my findings of  
3 fact as "proposed findings" and review them de novo. I can  
4 simplify the process by committing that any findings of fact I  
5 make at trial should be treated as proposed if the district court  
6 concludes that I lacked authority actually to enter those  
7 findings.

8 I also note that in non-core proceedings I can resolve pre-  
9 trial matters, including case-dispositive motions that do not  
10 require factual findings, notwithstanding the absence of consent  
11 from all parties. In re Healthcentral.com, 504 F.3d 775, 787 (9th  
12 Cir. 2007). In other words, if a proceeding could be disposed of  
13 on uncontested facts, summary judgment would be appropriate. The  
14 legal rules are always subject to de novo review. There is  
15 absolutely no reason why I would not follow the same procedure if  
16 these matters are found "unconstitutionally core" (viz., non-core)  
17 matters.

18 *C. Stern v. Marshall*

19 1. The Holding - and What It Did Not Hold.

20 Stern is the first Supreme Court decision to address the  
21 constitutionality of any portion of Section 157(b) since its  
22 enactment. The Court held that a bankruptcy court cannot enter  
23 final findings of fact with respect to a debtor's state law  
24 counterclaim against a creditor who had filed a proof of claim  
25 against the bankruptcy estate. The court concluded that while  
26 Section 157(b)(2) -- which identifies "counterclaims by the estate  
27 against persons filing claims against the estate" as core --  
28 conferred statutory authority for the court to hear and determine

1 the counterclaim, that portion of the statute was an  
 2 unconstitutional allocation of judicial power from Article III  
 3 judges to Article I bankruptcy judges:

4 Article III, § 1, of the Constitution commands that  
 5 "[t]he judicial Power of the United States, shall be  
 6 vested in one supreme Court, and in such inferior Courts  
 7 as the Congress may from time to time ordain and  
 8 establish." That Article further provides that the  
 9 judges of those courts shall hold their offices during  
 10 good behavior, without diminution of salary. Ibid.  
 11 Those requirements of Article III were not honored here.  
 12 The Bankruptcy Court in this case exercised the judicial  
 power of the United States by entering final judgment on  
 a common law tort claim, even though the judges of such  
 courts enjoy neither tenure during good behavior nor  
 salary protection. We conclude that, although the  
 Bankruptcy Court had the statutory authority to enter  
 judgment on [the debtor's] counterclaim, it lacked the  
 constitutional authority to do so.

13 Stern, 131 S.Ct. at 2600-01.

14 Defendants contend that Stern is a game-changer: that I  
 15 cannot enter a final judgment in the underlying fraudulent  
 16 conveyance actions, notwithstanding the provisions of Section  
 17 157(b). While dicta in Stern may indicate that fraudulent  
 18 transfer actions cannot be finally heard and determined by an  
 19 Article I judge,<sup>12</sup> the holding is much narrower.

---

20  
 21 <sup>12</sup>The Supreme Court stated that it had concluded in  
 22 Granfinanciera v. Nordberg, 492 U.S. 33 (1989), that "Congress  
 23 could not constitutionally assign resolution of [a] fraudulent  
 24 conveyance action to a non-Article III court." Stern, 131 S.Ct.  
 at 2614, n.7. "Because neither party asks us to reconsider the  
 public rights framework for bankruptcy, we follow the same  
 approach here." Id. In the text accompanying footnote 7, the  
 Court further stated:

25 The most recent case in which we considered application  
 26 of the public rights exception – and the only case in  
 27 which we have considered that doctrine in the bankruptcy  
 context since Northern Pipeline – is [Granfinanciera].  
 28 In Granfinanciera we rejected a bankruptcy trustee's  
 argument that a fraudulent conveyance action filed on  
 behalf of a bankruptcy estate against a noncreditor in a

1  
2 The comments in Stern about Granfinanciera do support an  
3 argument that the statutory designation of fraudulent transfer  
4 actions as core may be unconstitutional; however, one could also  
5 extrapolate from statements made in the decision that such a  
6 delegation is not appropriate when section 544(b) and section 548  
7 claims are asserted. Id. at 2618 (a matter may be core if "the  
8 action at issue stems from the bankruptcy itself"). The bottom  
9 line, though, is that the Supreme Court did not hold in Stern that  
10 bankruptcy judges lack authority to render final judgments on  
11 fraudulent transfer claims. In fact, it emphasized -- repeatedly  
12 -- that its holding was narrow and limited to Section 157(b)(2)(C)  
13 (counterclaims). Given these express limitations of the holding,  
14 I believe I am still bound by the Ninth Circuit's holding in In re  
15 Mankin, 823 F.2d 1296 (9th Cir. 1987), that fraudulent transfer  
16 actions are core whether arising directly under section 548 of the  
17 Bankruptcy Code or from state law (but made available to a

18  
19 bankruptcy proceeding fell within the "public rights"  
20 exception. We explained that, "[i]f a statutory right  
21 is not closely intertwined with a federal regulatory  
22 program Congress has power to enact, and if that right  
23 neither belongs to nor exists against the Federal  
24 Government, then it must be adjudicated by an Article  
25 III court." Id., at 54-55, 109 S.Ct. 2782. We reasoned  
26 that fraudulent conveyance suits were "quintessentially  
27 suits at common law that more nearly resemble state law  
28 contract claims brought by a bankrupt corporation to  
augment the bankruptcy estate than they do creditors'  
hierarchically ordered claims to a pro rata share of the  
bankruptcy res." Id., at 56, 109 S.Ct. 2782. As a  
consequence, we concluded that fraudulent conveyance  
actions were "more accurately characterized as a private  
rather than a public right as we have used those terms  
in our Article III decisions." Id., at 55, 109 S.Ct.  
2782.

Stern, 131 S.Ct. at 2614.

1 bankruptcy estate under section 544(b)) and that Section  
 2 157(b)(2)(H) (fraudulent transfers) does not violate Article III  
 3 of the Constitution by authorizing bankruptcy judges to decide  
 4 them.<sup>13</sup>

## 5 2. The Applicability of Stern To These Proceedings

6 In concluding that a defendant is entitled to Article III  
 7 adjudication of a counterclaim that does not arise under  
 8 bankruptcy law and that does necessarily have to be determined in  
 9 allowing or disallowing the initial claim, the Supreme Court  
 10 explicitly limited the scope of its holding: "We conclude today  
 11 that Congress, in one isolated respect, exceeded that [Article  
 12 III] limitation . . . ." <sup>14</sup> Id. at 2620. This narrow holding "does  
 13

14 <sup>13</sup>I recognize that the Ninth Circuit's holding in Mankin was  
 15 based on its conclusion that a trustee's ability to avoid a  
 16 fraudulent transfer is a public right, a conclusion that is  
 17 contrary to the Supreme Court's holding in Granfinanciera.  
 18 Nonetheless, neither Granfinanciera (which involved a defendant's  
 right to a jury trial in a fraudulent conveyance action) nor Stern  
 overrule Mankin's holding: that section 157(b)(2)(H) is  
 constitutional.

19 <sup>14</sup>In a thorough and thoughtful analysis of the Stern decision,  
 the court in In re Salander O'Reilly Galleries, 453 B.R. 106, 115-  
 20 116 (Bankr. S.D.N.Y. 2011) pointed out the many instances in which  
 the Supreme Court indicated that its holding was narrow, stating:

21 Stern is replete with language emphasizing that the  
 22 ruling should be limited to the unique circumstances of  
 that case, and the ruling does not remove from the  
 23 bankruptcy court its jurisdiction over matters directly  
 24 related to the estate that can be finally decided in  
 connection with restructuring debtor and creditor  
 relations.

25 Among the examples cited by the Salander O'Reilly court are the  
 26 following:

27 [T]he debtors' claims in the cases on which [Vickie  
 Marshall] relies were themselves federal claims under  
 28 bankruptcy law, which would be completely resolved in  
 the bankruptcy process of allowing or disallowing

1 not impact a bankruptcy court's ability to enter a final judgment  
 2 in any other type of core proceeding authorized under 28 U.S.C. §  
 3 157(b)(2)." In re Peacock, 2011 WL 3874461 (Bankr. M.D. Fla.  
 4 Sept. 2, 2011); see also In re Safety Harbor Resort and Spa, 2011  
 5 WL 3849639 (Bankr. M.D. Fla. 2011) (concluding that actions to  
 6 recover preferential transfers remain core).

7 As observed by the Safety Harbor court and the bankruptcy  
 8 court in In re Washington Mut., Inc., 2011 WL 4090757 (Bankr. D.  
 9 Del. 2011), the majority in Stern acknowledged that a  
 10 determination of whether a matter is core requires a consideration  
 11 of "whether the action at issue stems from the bankruptcy itself"  
 12 (Stern, 131 S.Ct. at 2618). Here, as noted, the fraudulent  
 13 transfer actions are authorized by sections 544(b) and 548 of the  
 14 Bankruptcy Code.

15 Moreover, but for the bankruptcy, Heller could not assert  
 16 these claims at all. As the transferor, it would lack standing  
 17 had it not acquired the rights and duties of a trustee as a  
 18 debtor-in-possession (and now as the liquidating debtor). The

---

19  
 20 claims. Here Vickie's claim is a state law action  
 21 independent of the federal bankruptcy law and not  
necessarily resolvable by a ruling on the creditor's  
proof of claim in bankruptcy.

22 Stern, 131 S.Ct. at 2610 (emphasis added); id. at 2618 ("Congress  
 23 may not bypass Article III simply because a proceeding may have  
 24 some bearing on a bankruptcy case; the question is whether the  
action at issue stems from the bankruptcy itself or would  
 25 necessarily be resolved in the claims allowance process ")  
 26 (emphasis added); id. at 2619 ("We do not think the removal of  
 27 counterclaims such as Vickie's from core bankruptcy jurisdiction  
 28 meaningfully changes the division of labor in the current statute;  
we agree with the United States that the question presented here  
is a 'narrow' one"); id. at 2620 ("We conclude today that  
 Congress, in one isolated respect, exceeded [the limitations of  
 Article III] in the Bankruptcy Act of 1984").



1 Ninth Circuit in Mankin drew another important distinction between  
2 fraudulent transfer actions and state law claims like those at  
3 issue in Northern Pipeline and Stern: those claims cannot exist  
4 but for the debtor's insolvency, its inability to pay debts as  
5 they become due, or its unreasonably small capital -- conditions  
6 which generally result in a bankruptcy.

7       The contract suit in Northern Pipeline could have been  
8 brought whether or not the plaintiff was bankrupt. A  
9 fraudulent conveyance, though, can only exist if the  
10 conveyor is insolvent or about to become insolvent, and  
11 thus is inextricably tied to the bankruptcy scheme. See  
In re Kaiser, 722 F.2d 1574, 1582 (2d Cir. 1983). If a  
conveyor enjoys good financial health, a conveyance  
cannot harm its creditors, who would thus have no cause  
of action to recover transfer.

12 Mankin, 823 F.2d at 1307 n.4.

13       As I acknowledged earlier, the Supreme Court has previously  
14 concluded that fraudulent conveyance actions do not involve  
15 "public rights." Granfinanciera, 492 U.S. 33 (1989). In Stern,  
16 the Supreme Court reached its "narrow" holding -- purportedly  
17 unlikely to have significant "practical consequences" or "change  
18 all that much" -- by reasoning that the debtor's claim did not  
19 involve a "public right" and thus could not be delegated to a non-  
20 Article III court for final determination. If that reasoning had  
21 been the holding, I would agree that core fraudulent transfer  
22 actions might exceed my authority. But the holding was expressly  
23 limited, and given that Heller's claims do arise from bankruptcy  
24 law (11 U.S.C. §§ 544(b) & 548) and would not exist but for the  
25 bankruptcy (unlike the counterclaims in Stern), I believe that  
26 Stern may not limit my power to enter a final judgment on those  
27

1 claims. See Safety Harbor, 2011 WL 3849639 at \*1;<sup>15</sup> In re  
 2 Innovative Comm. Corp., 2011 WL 3439291 (Bankr. D. V.I. Aug. 5,

3  
 4 <sup>15</sup>The Safety Harbor ably explained why the Stern's reliance on  
 5 Granfinanciera does not mean that fraudulent transfers are no  
 longer core:

6 Nor does the Stern Court's reliance on Granfinanciera  
 7 actually limit a bankruptcy court's jurisdiction to  
 8 finally resolve the other core proceedings identified in  
 9 section 157(b)(2). Understandably, some bankruptcy  
 10 courts have expressed concerns about the litigation that  
 11 may result due to uncertainties created by Stern with  
 12 respect to other types of proceedings defined as core  
 13 under section 157(b)(2) that were not at issue in Stern.  
 14 To be sure, the Stern Court did explain that  
 15 Granfinanciera's "distinction between actions that seek  
 16 'to augment the bankruptcy estate' and those that seek  
 17 'a pro rata share of the bankruptcy res' reaffirms that  
 18 Congress may not bypass Article III simply because a  
 19 proceeding may have some bearing on a bankruptcy case."  
 20 And the Stern Court did emphasize that the "question is  
 21 whether the action at issue stems from the bankruptcy  
 22 itself or would necessarily be resolved in the claims  
 23 allowance process." It is understandable that some would  
 24 view that language as a new limit on the Court's  
 25 constitutional authority to finally resolve other "core"  
 26 proceedings, such as fraudulent conveyance or preference  
 27 actions.

18 But the Stern Court's use of the word "reaffirm" makes  
 19 clear that nothing has changed. The sole issue in  
 20 Granfinanciera was whether the Seventh Amendment  
 21 conferred on petitioners a right to a jury trial in the  
 22 face of Congress' decision to allow a non-Article III  
 23 tribunal to adjudicate the claims against them.  
 24 Granfinanciera did not hold that bankruptcy courts lack  
 25 jurisdiction to enter final judgments on fraudulent  
 26 conveyance claims. In fact, the Supreme Court went to  
 27 great lengths to emphasize that issue was not even  
 before it in that case. As explained in Granfinanciera,  
 "however helpful it might be for us to adjudge every  
 pertinent statutory issue presented by the 1978 Act and  
 the 1984 Amendments, we cannot properly reach out and  
 decide matters not before us. The only question we have  
 been called upon to answer in this case is whether the  
 Seventh Amendment grants petitioners a right to a jury  
 trial."

27 Safety Harbor, 2011 WL 3849639 at \*10-11.

1 2011) (holding that bankruptcy court could enter final judgment on  
2 a section 548 claim, notwithstanding the dicta in Stern, but  
3 entering proposed findings with respect to the state law  
4 fraudulent transfer claims brought by the trustee under section  
5 544).

6 After Stern, some courts have concluded that they cannot hear  
7 fraudulent conveyance claims as core proceedings. They are  
8 focusing on the dicta of Stern, not its holding. I believe that  
9 this approach thrusts unnecessary burdens on already overworked  
10 district courts, especially when bankruptcy courts have a  
11 particular expertise in and familiarity with avoidance actions.

12 If there is a constitutional challenge, as stated previously,  
13 I can deal with it as any trial court should, with the tried and  
14 true appellate procedures in place and the "proposed findings"  
15 alternative for my findings of fact where necessary. The record  
16 should be fully developed and the determination of  
17 unconstitutionality reserved as a last resort rather than made so  
18 near the outset of the cases in what may truly be a needless  
19 advisory opinion. These adversary proceedings may be resolved by  
20 summary judgment (no facts to find; conclusions of law reviewed de  
21 novo) and even with findings (or proposed findings) favorable to  
22 defendants.

23 4. Authority to Deal with Core Matters.

24 I disagree with at least one court's post-Stern holding that  
25 it not only was unable to hear and determine fraudulent transfer  
26 claims designated as core in Section 157(b)(2)(H), but that it  
27 could not enter proposed findings as it could if the claims were  
28 non-core. In re Blixseth, 2011 WL 3274042 (Bankr. D. Mont. Aug.

1 1, 2011).

2       The Blixseth court reasoned that the absence of provisions in  
3 title 28 permitting a bankruptcy court to enter proposed findings  
4 in matters designated prevented it from making such findings.  
5 Assuming - as I do not - that fraudulent transfer actions can no  
6 longer constitutionally be tried by a non-Article III judges,  
7 title 28 does not prohibit the use of the proposed findings  
8 procedure. The absence of a provision is not a prohibition.  
9 Further, Stern approved exactly such a procedure. Similarly, the  
10 fact that Bankruptcy Rule 9033 only mentions non-core proceedings  
11 in no way prohibits following the same procedure in core matters.  
12 In re Emerald Casino, Inc., 2011 WL 3799643 at \*1 and n.1 (Bankr.  
13 N.D. Ill. Aug. 26, 2011) (disagreeing with Blixseth and noting  
14 that if a matter is no longer covered by the statutory definition  
15 of core, they can still be non-core and fall fully within the  
16 definition of "related to" proceedings.).

17       In summary, if the fraudulent transfer claims are ultimately  
18 determined to fall outside the scope of my authority they would  
19 still be related to the bankruptcy case. I could enter proposed  
20 findings and, as stated above, I could determine dispositive  
21 motions that do not require factual findings. Healthcentral.com,  
22 504 F.3d at 787. Finally, where a right to a jury exists and the  
23 parties do not consent to my presiding, our Bankruptcy Local Rules  
24 provide a simple procedure that once again spares the district  
25 judge from dealing with these specialized cases until it is time  
26  
27  
28

1 to call the jury.<sup>16</sup>

2 IV. CONCLUSION

3 For the foregoing reasons, I believe that Stern is  
4 inapplicable and that these matters are core proceedings in which  
5 I can enter a final judgment. Even if it were not, I could handle  
6 all pre-trial matters and motions exactly as I have done in other  
7 non-core cases. Any findings of fact could be treated as  
8 "proposed" as appropriate. I therefore recommend that the  
9 district court deny to motions to withdraw the reference of these

10

11 <sup>16</sup>B.L.R. 9015-2 provides, in part:

12 **9015-2. Jury Trials and Personal Injury and Wrongful Death Claims.**

13 **(a) Determination of Right.**

14 In any proceeding in which a demand for jury trial is made,  
15 the Bankruptcy Judge shall, upon the motion of one of the parties,  
16 or upon the Bankruptcy Judge's own motion, determine whether the  
17 demand was timely made and whether the demanding party has a right  
18 to a jury trial. The Bankruptcy Judge may, on the Judge's own  
19 motion, determine that there is no right to a jury trial in a  
20 proceeding even if all of the parties have consented to a jury  
21 trial.

22 **(b) Motion and Certification to District Court.**

23 If the Bankruptcy Judge determines that the demand for a jury  
24 trial was timely made and the party has a right to a jury trial, and  
25 if all parties have not filed written consent to a jury trial before  
26 the Bankruptcy Judge, the Bankruptcy Judge shall, after having  
27 resolved all pre-trial matters, including dispositive motions,  
28 certify to the District Court that the proceeding is to be tried by  
a jury and that the parties have not consented to a jury trial in  
the Bankruptcy Court, and shall include in such certification, a  
report of the status of the proceeding and a recommendation on when  
the matter would be suitable for withdrawal from the Bankruptcy  
Court. Upon such certification, the party who has demanded a jury  
trial shall promptly file a motion in accordance with B.L.R. 5011-  
2(a) for withdrawal of the reference of the proceeding to be tried  
to a jury. The motion and the certification shall thereafter be  
handled in the District Court in accordance with B.L.R. 5011-2(c),  
(d) and (e).

28



1 adversary proceedings.

2

3

Respectfully submitted

4

5

/s/ Dennis Montali  
United States Bankruptcy Judge

6

7

8

\*\*\* END OF RECOMMENDATION \*\*\*

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

-19-